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U.S. - Supreme Court, U. S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 868

MILTON SCOTT ANTHONY,

Petitioner,

vs.

THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON
AND BRIEF IN SUPPORT THEREOF.

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WM. P. LORD,
BEN ANDERSON,
CLAUD H. GILES,
Counsel for Petitioner.

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vs.

THE STATE OF OREGON,

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Milton Scott Anthony petitions the Court to issue a Writ of Certiorari to the Supreme Court of the State of Oregon, requiring that there be certified to the Supreme Court for determination by it that certain cause in which petitioner was defendant, and the State of Oregon was plaintiff.

Summary Statement of Matters Involved

The petitioner was indicted by the grand jury of Coos County, Oregon, upon an indictment reading as follows:

“Milton Scott Anthony is accused by the Grand Jury of the County of Coos, State of Oregon, by this

Indictment of the crime of commission of an act of sexual perversity, Section 23-910 O. C. L. A. committed as follows:

The said Milton Scott Anthony on the 20th day of November, 1944, in the County of Coos and State of Oregon then and there being, did then and there unlawfully and feloniously commit an act of sexual perversity upon another, to-wit: one Irma Smith, a female person, by then and there wilfully, knowingly, intentionally and by force and violence inserting a blunt object, a more particular description thereof being to the Grand Jury unknown, into the anal opening and through the wall of the rectal portion of the bowel and the vagina of her, the said Irma Smith, with intent by him, the said Milton Scott Anthony, to thereby, then and there, perform and commit an act of sexual perversity upon her, the said Irma Smith, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

Petitioner filed a demurrer to the indictment based upon the ground that the indictment failed to charge petitioner with the commission of a crime, and this demurrer was overruled. Petitioner entered a plea of not guilty, was tried, found guilty and sentenced to the penitentiary.

The statute under which petitioner was tried is Section 23-910 of the Oregon Statutes, reading as follows:

"#23-910. Sodomy. If any person shall commit sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustain osculatory relations with the private parts of any man, woman or child, or permit such relations to be sustained with his or her private parts, such person shall upon conviction thereof, be punished by imprisonment in the penitentiary not less than one year nor more than fifteen years."

In the Supreme Court petitioner contended that the provision of the statute "or any act or practice of sexual per-

versity" was too indefinite to be sustained under the Fourteenth Amendment to the Constitution of the United States, and cited and quoted from the case of *Lanzetta v. N. J.*, 306 U. S. 451.

The Supreme Court of Oregon overruled this contention, after reviewing many authorities:

"The indictment, while not artfully drawn, did, nevertheless, state the crime in such a manner as to enable a person of common understanding to know what is intended."

The Court also commented that it could not hold the statute void for indefiniteness without overruling *State v. Brazell*, 126 Or. 579.

The contention was not made in the case of *State v. Brazell*, 126 Or. 579, that Section 23-910 was void for indefiniteness and uncertainty. An affidavit was attached to the petition for rehearing by counsel that the record and briefs in that case had been carefully examined and there was no issue made in the trial court or in the Supreme Court that the statute was void. No claim was made in the *Brazell* case that the statute was unconstitutional under the Fourteenth Amendment. In no previous case coming before the Oregon courts was this question raised.

The Supreme Court denied the petition for rehearing on the 3rd day of September, 1946.

Jurisdiction of the United States Supreme Court

It has already been shown that the petitioner claimed that Section 23-910 O. C. L. A. is too indefinite to be sustained under the Fourteenth Amendment.

Judgment of the Supreme Court was entered on the 28th day of May, 1946. Petition for rehearing was filed on the — day of August, 1946. Petition for rehearing was con-

sidered by the Court and thereafter denied on the 3rd day of September, 1946.

Reasons for Allowance of the Writ

Petitioner makes claim that the provision of the statute "or any act or practice of sexual perversity" is too indefinite to be sustained. An act or practice of sexual perversity was unknown to the common law as a criminal offense, and the statute leaves it to the varying opinions of juries and judges to determine what constitutes an act of sexual perversity. As a matter of national public interest such statutes should be declared violative of the Fourteenth Amendment.

Specification of Error

The Supreme Court of Oregon erred in holding that the quoted provision is not void for indefiniteness under the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, petitioner prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Oregon, and that the cause may be reviewed and determined by this Court, and the judgment of the Supreme Court of Oregon may be reversed by this Court.

MILTON SCOTT ANTHONY,
Petitioner,

By WM. P. LORD,
One of His Attorneys.

WM. P. LORD,
BEN ANDERSON,
CLAUD H. GILES,

Attorneys for Petitioner,
Address: 317 S. W. Alder Street,
Portland 4, Oregon.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

New Jersey undertook to enact a statute designed to reach and punish gangsterism. It declared that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who had been convicted at least three times of being a disorderly person, or who had been convicted of any crime, is a gangster. A case coming to this Court, the statute was challenged under the Fourteenth Amendment, and this Court held the statute void for uncertainty. This was the case of *Lazetta v. N. J.*, 306 U. S. 451, and no better statement can be made of petitioner's position as to the constitutionality of this statute than to quote from the opinion.

Says this Court:

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Constr. Co.* 269 U.S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'

"The phrase 'consisting of two or more persons' is all that purports to define 'gang'. The meanings of that word indicated in dictionaries and in historical and sociological writings are numerous and varied. Nor is the meaning derivable from the common law,

for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a 'gang'."

In conclusion the Court says:

"The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

It is also pointed out in the opinion if the provision is repugnant to the due process clause, a specification of the details of the offense intended to be charged would not serve to validate it.

"It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warn against transgression."

Yet the Supreme Court of Oregon, after citing a number of cases in which statutes phrased in broad and general terms have been limited by construction, and then applied to situations clearly within the statutory words as construed, says:

"Applying the foregoing principles to the case at bar, we concede that there is a grave question whether the statute can be saved from invalidity in view of the indefiniteness of the phraseology. By this statute the legislature has ventured into the dim and uncertain mazes of abnormal psychology. If the act were to be left unlimited and undefined by construction and the question of guilt or innocence were left in every case as a question of fact for the jury, we think it would not only be void for uncertainty but might also be applied in such manner as to invade other constitutional rights.

But we hold that the statute may be so limited by construction as to render it valid as here applied."

The provision of the statute "or any act or practice of sexual perversity" was an amendment made to the statute in 1913, which was designed to cover the situation that is shown in the case of *State v. Stark*, 65 Or. 178, although there was a specific amendment covering the exact facts in that case, and the quoted provision was thrown in as a "catch-all."

Respectfully submitted,

WM. P. LORD,

BEN ANDERSON,

CLAUD H. GILES,

Attorneys for Petitioner,

Address: 317 S. W. Alder Street,

Portland 4, Oregon.

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